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Honorable Rosanna Malouf Peterson

**UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON**

JOHN C. HARVEY,)	No. 10-CV-5091-RMP
a married person,)	
)	
Plaintiff,)	ALLIANCEONE RECEIVABLES
)	MANAGEMENT, INC.'S
v.)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
ALLIANCEONE RECEIVABLES)	ITS MOTION TO DISMISS
MANAGEMENT, INC., a debt)	
collection agency; and CREDIT ONE)	
BANK, N.A., a nationally chartered)	
bank holding company,)	
)	
Defendant.)	

**I.
 MOTION STANDARDS**

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) addresses the court's subject matter jurisdiction. "A federal court is presumed to lack jurisdiction in a

1
2 particular case unless the contrary affirmatively appears." *Stock West, Inc. v.*
3 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). A plaintiff bears the burden
4 to establish that subject matter jurisdiction is proper. *Prescott v. United States*, 973
5 F.2d696, 701 (9th Cir. 1992).
6

7 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) states that the facts, as pled,
8 fail to state a claim upon which relief can be granted. FRCP 12(b)(6). In ruling on such
9 a motion, legal conclusions cast as factual allegations may not benefit from the
10 presumption of truthfulness. *In re Rockefeller Center Properties, Inc.*, 311 F.3d 198, 216
11 (3d. Cir. 2002).
12

13 II. 14 ARGUMENT AND AUTHORITY

15 A. Plaintiff's Claims and Background Facts.

16 Plaintiff initiated suit against two Defendants, Credit One Bank, N.A. (a creditor)
17 and AllianceOne Receivables Management, Inc. (a collection agency), but reached a
18 settlement with Credit One and has dismissed that Defendant. (Dkt.# 10). The facts and
19 claims alleged in Plaintiff's Complaint are sparse, but sufficient for this Court to
20 determine the issues in this Motion as a matter of law. Specifically, Plaintiff states that
21 he:
22
23

- 24 (1) filed for Bankruptcy protection on February 16, 2010;
- 25 (2) notified Credit One of his bankruptcy and retention of counsel; and
- 26 (3) on May 21, 2010, AllianceOne attempted to collect a debt previously
assigned by Credit One.

1 (Dkt. #1 at pg. 3.)

2 He concludes, based on the above facts, that AllianceOne violated 15 U.S.C.
3 §1692f(1), by attempting to collect a debt which it could not legally collect, and
4 §1692c(a)(2), by communicating with Harvey after he had sent written notification that
5 he was represented by counsel. He also alleges state law claims. (Dkt. #1 at pg. 3.)
6

7
8 B. §1692f(1) Claim and Analysis of *Walls v. Wells Fargo*
9

10 In 1997, Donna Marie Walls filed a Chapter 7 bankruptcy petition and listed,
11 among other debts, a \$118,000 obligation to Wells Fargo Bank. *Walls v. Wells Fargo*
12 *Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002). Ms. Walls received a discharge in January,
13 1998. *Walls* at 503. Ms. Walls subsequently filed suit against Wells Fargo Bank in
14 federal district court, alleging that the Bank had attempted to collect on the debt during
15 the automatic stay as well as after she received her discharge, in violation of 11 U.S.C.
16 sec. 524, and further alleged that such conduct violated the FDCPA, 15 U.S.C. sec.
17 1692f. *Id.*
18

19 Wells Fargo moved to dismiss the FDCPA claim under FRCP 12(b)(6) for lack of
20 jurisdiction and the district court granted the motion. *Id.*
21

22 On appeal, Walls argued to the Ninth Circuit that an FDCPA claim is "outside of
23 the bankruptcy proceedings because the bankruptcy is over and done with, while the
24 FDCPA is needed to protect a debtor who has been discharged." *Id.*
25

26 In considering her argument, the Ninth Circuit focused on the basis for Walls
27

1 FDCPA claim under §1692f , which clearly arose out of an alleged violation of 11
2 U.S.C. § 524, and found that such necessarily entailed "bankruptcy-laden
3 determinations." *Walls* at 515.

4
5 The Court further explained:

6 The Bankruptcy Code provides its own remedy for violating §524,
7 civil contempt under §105. To permit a simultaneous claim under
8 the FDCPA would allow through the back door what *Walls* cannot
9 accomplish through the front door -- a private right of action. This
10 would circumvent the remedial scheme of the Code under which
11 Congress struck a balance between the interests of debtors and creditors
12 by permitting (and limiting) debtors' remedies for violating the discharge
13 injunction to contempt. . . . Nothing in either Act persuades us that
Congress intended to allow debtors to bypass the Code's remedial
scheme when it enacted the FDCPA..

14 *Walls* at 515-16.

15
16 In reaching its conclusion to affirm the District Court's dismissal, the Ninth
17 Circuit added: "because *Walls* remedy for violation of §524, no matter how cast, lies in
18 the Bankruptcy Code, her simultaneously FDCPA claim is precluded". *Id.* at 516-17
19 (emphasis added).

20 Just as in *Walls*, here Mr. Harvey is precluded from bringing a private right of
21 action in District Court for an FDCPA violation under §1692f, where his claim is, at its
22 essence, a claim for violation of §524 of the Bankruptcy Code.

23
24 Plaintiff's §1692f claim against AllianceOne should be dismissed.

25
26 C. §1692c(a)(2) Claim, Notice of Representation

1 With regard to the claim that AllianceOne violated §1692c(a)(2), the Complaint
2 clearly states that notice was sent to Credit One, not AllianceOne, its agent. (Dkt.# 1).
3 In the context of FDCPA issues, notice to a principal (here, Credit One) does not operate
4 as notice an agent. *Clark v. Capital Credit*, 460 F.3d 1162, 1177 (9th Cir. 2006). Thus,
5 Plaintiff fails to state a claim against AllianceOne under §1692c(a)(2) because he does
6 not allege any notice to AllianceOne of representation by counsel. This claim should be
7 dismissed.
8

9
10 D. State law claims, Declining Jurisdiction

11 If the above-discussed federal claims are dismissed, this Court should decline
12 jurisdiction over the state law claims. The Ninth Circuit has specifically stated that a trial
13 court should dismiss pendent state claims when no federal claims remain. *Jones v.*
14 *Community Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir. 1984).
15

16
17 Dated this 6th day of April, 2011.

18
19 /s/ Kimberlee Walker Olsen

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28 **CERTIFICATE OF SERVICE**

ALLIANCEONE'S MEMO. OF POINTS - 5
CASE NO. CV-10-5091-RMP

1 I hereby certify that on April 6, 2011, I electronically filed the foregoing with the
2 Clerk of the Court using the CM/ECF System which will send notification of such filing
3 to the following: Robert J. Reynolds.

4 /s/ Kimberlee Walker Olsen
5 Kimberlee Walker Olsen, WSBA #28773
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